IN THE

Supreme Court of the United States

No._____

OCTOBER TERM, A. D. 1946

CHARLES L. SMITH,
Petitioner,

v.

PAUL A. PORTER, Administrator,
Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

To the Honorable the Supreme Court of the United States:
Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

On June 17, 1946, petitioner was served with a purported O. P. A. administrative subpoena duces tecum (R. 6-8). It was signed only by the director of the Seattle district office of the O. P. A. The paper demanded that petitioner, a sole trader doing business as The Dungeness Company

(R. 12), produce all of his financial, accounting, cost and other records at petitioner's office in Seattle on June 18, 1946, for inspection and copying by Ralph Owen and E. V. Patterson (R. 6-7) whose official capacities, if any, are not specified in the subpoena.

Petitioner did not honor the demands of the document and on June 21, 1946, a petition was filed with the district court on behalf of the Administrator of the O. P. A. praying that the court issue an order directing petitioner to appear and produce in his office the records described in the subpoena (R. 2-6). Petitioner was not served with a copy of the petition nor any order to show cause nor any paper whatsoever in connection therewith. Upon learning of the pendency of the petition through his attorneys, petitioner filed the following motions on June 24, 1946:

1. On special appearance, a motion to dismiss the petition because the court lacks jurisdiction over petitioner for the reason that the subpoena is insufficient on its face and invalid. (R. 9-10).

2. On special appearance, a motion to dismiss because the court lacks jurisdiction over petitioner by reason of a failure to serve petitioner with any process in connection with filing of the petition (R. 10-11).

3. Preserving the above special appearances and moving that the petition be dismissed because:

(a) The court lacks jurisdiction over the subject matter of the petition and

(b) The petition fails to state a claim against petitioner upon which relief can be granted

and his affidavit (R. 12) that petitioner is the sole owner of The Dungeness Company; that it is not a corporation but that petitioner is a sole trader doing business under such name; that he has the sole custody of the records; and that his refusal to obey the subpoena was not contumacious but based upon advice of counsel that the subpoena is invalid.

The district court denied all of these motions on August 7, 1946 (R. 17-19). On August 5, 1946 (R. 15-16), the district court entered its order directing petitioner to appear at his office on August 12, 1946, and produce and make available to the Administrator and his authorized employees all the records listed numerically in the subpoena which pertain to the business of The Dungeness Company. This order was entered without a hearing of any kind and without the court having before it any evidence of the materiality of the records sought and without the court entering any findings of fact or conclusions of law.

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 20) assigning as error the denial of

each of petitioner's respective motions and the entry of the order by the district court (R. 23-26). The circuit court on November 25, 1946, entered its opinion and order affirming all the challenged actions of the district court (R. 32-38). A petition for rehearing filed by petitioner on December 23, 1946, was denied by the circuit court on December 30, 1946.

This case involves the validity of the administrative subpoena, the correctness of the order of the circuit court affirming the action of the district court in denying each of petitioner's respective motions and the validity of the order of the district court which was sustained by the circuit court.

Also involved is the authority of the Administrator to delegate his subpoena power. Statutes involved are 50 U.S.C.A. App. secs. 921 (a), (b) and (d), 922 (a), (b), (c), (e) and (g), and 925 (a) and (e). A construction of General Order 53 (8 F.R. 9037) as revised May 13, 1944 (9 F.R. 5191), by which the Administrator purports to delegate his subpoena power is also involved. These statutes and General Order 53 appear in full in the appendix hereto.

No question of fact is involved.

This writ of certiorari is sought to review the opinion and order of affirmance of the Circuit Court of Appeals for the Ninth Circuit.

JURISDICTION

The jurisdiction of this court is invoked by virtue of section 240 of the Judicial Code (Title 28 U.S.C.A. sec. 347). We believe that the jurisdiction of this court is further sustained by 50 U.S.C.A. App. sec. 922, which is the statutory basis for the filing of the petition on behalf of the Administrator and the order of the district court directing petitioner to comply with the subpoena.

The opinion of the circuit court was filed November 25, 1946, (R. 31). The petition for rehearing was filed on December 23, 1946 (R. 38) and a rehearing was denied December 30, 1946 (R. 38). This petition is filed well within the three months limitation since the time does not begin to run until the date of the disposition by the circuit court of the petition for rehearing. *U. S. v. The Seminole Nation,* 299 U. S. 417; *N. L. R. B. v. Mackay Radio and Telegraph Co.,* 304 U. S. 333; *Market Street R. R. Co. v. Railroad Commission of Calif.,* 324 U. S. 548.

QUESTIONS PRESENTED

All of the questions presented arise from the action of the district court in denying each of petitioner's motions to dismiss (R. 9-11, 17-19) and the entry of the order by the district court directing petitioner to comply with the sub-

poena (R. 15-16). There are no issues of fact whatsoever, the questions involved being purely legal.

The questions presented are as follows:

1. Does the Administrator of the Office of Price Administration have authority to delegate his subpoena power?

2. Was the subpoena valid where signed only by the district director of the O. P. A. and where it was not signed by, nor on behalf of, the Administrator of the O. P. A.?

3. Was the subpoena valid where it required the records of petitioner to be inspected and copied by Ralph Owens and E. V. Patterson when the subpoena fails to specify what, if any, governmental authority each of them may have?

4. Is the subpoena valid where it fails to state the subject of the inquiry, does not limit the documents demanded to those material to a stated inquiry, nor particularly describe the books and records sought so they can be readily identified?

5. Is the subpoena so vague and sweeping in its requirements as to be unreasonable in its demands and thus void?

6. Did the district court have jurisdiction over petitioner when he was never served with any process whatsoever in connection with the filing of the petition?

7. Is such a proceeding governed by the Rules of Civil Procedure?

8. Did the district court have jurisdiction over the subject matter of the petition, in view of the infirmities of the subpoena, sufficient to authorize the court to enter its order of compliance against petitioner?

9. Did the petition state a cause of action or claim upon which relief could be granted?

10. Was the district court's order valid where there was no hearing of any kind, nor any evidence produced, concerning the materiality of the records sought and the court entered no findings of fact and conclusions of law?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Ninth Circuit holding that the subpoena power of the Administrator is delegable is in direct conflict with *Cudahy Packing Co. v. Holland*, 315 U. S. 357, on the same point.

2. The decision of the circuit court holding that the subpoena power of the Administrator is delegable is in direct conflict with *Porter v. Mohawk Wrecking & Lumber Co.*, (CCA6) 156 F (2) 891, wherein the Circuit Court of Appeals for the Sixth Circuit reaches a contrary conclusion on the same point.

3. The decision of the circuit court is probably in conflict with *Pinkus v. U. S.*, (CCA7) 155 F (2) 90, where

the Circuit Court of Appeals for the Seventh Circuit apparently holds (p. 92) that under revised General Order 53 (9 F.R. 5191) the subpoena must be issued in the name of the Administrator and signed with his name by the district director. The decision here sought to be reviewed holds the contrary since the subpoena involved was not issued in the name of the Administrator nor signed with the Administrator's name by the district director (R. 6-7).

4. The decision of the circuit court is in conflict with *Boules v. Beatrice Creamery Co.*, (CCA 10) 146 F (2) 774, where the Circuit Court of Appeals for the Tenth Circuit ruled that process such as here involved must state the subject of the inquiry, must particularly describe the records sought so they can be readily identified and must limit its requirements to books and papers that are relevant to the inquiry. The subpoena here involved does not meet any of these tests but was held valid. *Cf. Okla. Press Pub. Co. v. Walling*, 327 U. S. 186, 210, n. 46, 48.

5. The decision of the circuit court is probably in conflict with *Fleming v. Montgomery Ward & Co.*, (CCA 7) 114 F (2) 384 (cert. den. 311 U. S. 690) where the Circuit Court of Appeals for the Seventh Circuit holds that similar process must require production of the documents only to duly constituted authority. The subpoena did not identify Owens and Patterson as duly constituted authority (R. 6) but nevertheless was held valid.

6. The decision of the circuit court is probably in conflict with *Hale v. Henkel*, 201 U. S. 43, and *Fed. Trade Commission v. Amer. Tobacco Co.*, 234 U. S. 298, in that the subpoena here calls for all of petitioner's records, including all his general correspondence files, without any limitation whatsoever. *Cf. Okla. Press Pub. Co. v. Walling, supra.*

7. An important question of federal procedure concerning whether the Rules of Civil Procedure apply to proceedings of this kind was tendered, but not decided by the circuit court. If the Rules are applicable petitioner should have been served by a summons and the petition treated as a complaint (Rule 4, 12 (a)). The question of the applicability of the Rules is a substantial and important one upon which various circuits have expressed apparently divergent opinions. Those holding the view that the Rules do apply are as follows:

Martin v. Chandis Securities Co. (CCA 9) 128 F (2d) 731, 734.

Peoples Natural Gas Co. v. Federal Power Commission, (CCA DC) 127 F (2d) 153 (cert. den. 316 U. S. 700).

Perkins v. Endicott Johnson Corp., (CCA 2) 128 F (2d) 208 (affirmed 317 U. S. 501 without discussing this point).

Contrary rulings are :

Cudahy Packing Co. v. National Labor Relations Board, (CCA 10) 117 F (2d) 692.

Goodyear Tire & Rubber Co. v. Nat'l. Labor Relations Board, (CCA 6) 122 F (2d) 450.

Bowles v. Bay of N. Y. Coal & Supply Corp., (CCA 2) 152 F (2d) 330.

Nat'l. Relations Board v. Goodyear Tire & Rubber Co., (DC) 36 F Supp. 413.

Perkins v. Endicott Johnson Corp., (DC) 37 F Supp. 604.

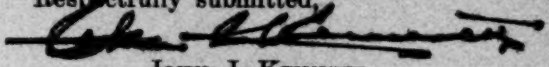
See also Commentary, 2 Fed. Rules Serv., p. 629.

8. The decision of the circuit court is in conflict with *Hale v. Henkel, supra, Fed. Trade Commission v. Amer. Tobacco Co., supra,* and *Okla. Press Pub. Co. v. Walling, supra,* in that the circuit court ruled that no hearing need be held, nor evidence produced, concerning the materiality of the documents sought and also ruled that no findings and conclusions of law need be entered.

WHEREFORE petitioner prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit to the end that said court's opinion and order affirming the rulings made and approving the order entered by the district court directing petitioner to comply with the sub-

poena may be reviewed and determined by this court, and that the cause be reversed, and for such other relief as the court may deem proper.

Respectfully submitted,



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BRIEF IN SUPPORT OF PETITION

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THE OPINION OF THE COURT BELOW

The opinion and order of the Circuit Court of Appeals for the Ninth Circuit (R. 32-38) being Cause No. 11414 of that court entered November 25, 1946, is not yet reported.

JURISDICTION

The date of the judgment to be reviewed is November 25, 1946 (R. 32-38). A petition for rehearing filed December 23, 1946, was denied on December 30, 1946 (R. 38).

The statutory provisions which are believed to sustain the jurisdiction of this court are Title 28 U.S.C.A. sec. 347 and 50 U.S.C.A. App. sec. 922.

Cases in which this court has deemed questions like those here involved worthy of review are:

Cudahy Packing Co. v. Holland, 315 U. S. 357

Okla. Press Pub. Co. v. Walling, 327 U. S. 186

Hale v. Henkel, 201 U. S. 43

Fed. Trade Comm. v. Amer. Tobacco Co., 234 U. S. 298

STATEMENT OF THE CASE

A statement of the case has already been made on page 7 of the petition, which statement is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the district court did not commit error in denying petitioner's Motion to Dismiss on Special Appearance Re Subpoena for the reason that said subpoena duces tecum was signed by the District Director, and not by the Price Administrator of the Office of Price Administration as required by the Emergency Price Control Act, as amended; that the subpoena duces tecum did not state the nature of the inquiry and did not limit the documents to be produced to those material to the inquiry; that the subpoena duces tecum by requiring all of the books, records and documents of Charles L. Smith pertaining to The Dungeness Company was so broad and sweeping as to be unreasonable in its demands.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the district court did not commit error in denying petitioner's Motion to Dismiss on Special Appearance Re Process for the reason that petitioner was never served with any process in connection with the Petition for an Order Requiring Respondents to Appear and Produce Certain Documents.

3. The Circuit Court of Appeals for the Ninth Circuit erred in ruling that the district court did not commit error in denying petitioner's Motion to Dismiss Petition for the reason the court never acquired any jurisdiction over the

subject matter of said petition and said petition fails to state a claim against petitioner upon which relief can be granted.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the district court did not commit error in granting the Order Requiring Appearance and Production of Documents for the reasons that the subpoena duces tecum was signed by the District Director and not by the Price Administrator of the Office of Price Administration as required by the Emergency Price Control Act, as amended; that the subpoena duces tecum did not state the nature of the inquiry, and did not limit the documents to be produced to those material to the inquiry; that the subpoena duces tecum by requiring all of the books, records and documents of petitioner pertaining to The Dungeness Company was so broad and sweeping as to be unreasonable in its demands; that petitioner was never served with any process in connection with the petition; that the court never acquired any jurisdiction over the subject matter of said petition and that said petition fails to state a claim against petitioner upon which relief can be granted.

ARGUMENT

SUMMARY OF ARGUMENT

This argument is addressed solely to the reasons why the writ of certiorari should be granted.

Briefly the argument is that the writ should be granted because the opinion and order of the Circuit Court of Appeals for the Ninth Circuit conflicts with rulings of this court and other circuit court rulings on the following questions:

1. Whether the Price Administrator can delegate the subpoena power granted him by 50 U.S.C.A. App. sec. 922.

2. If the Price Administrator can lawfully delegate such subpoena power, whether the subpoena here involved complies with General Order No. 53 as revised May 13, 1944 (9 F.R. 5191).

3. Whether the subpoena must state the subject of the inquiry, limit the documents sought to those material to such stated inquiry and describe the wanted records with such particularity that they can be readily identified.

4. Whether the subpoena must specify the authority of those persons named therein who are to examine and copy such records.

5. Whether the subpoena was so broad and sweeping in its demands as to be unreasonable and thus void.

6. Whether the Rules of Civil Procedure apply to proceedings such as are here involved.

7. Whether in proceedings such as these the district court must hold a hearing, or have some evidence presented to it, concerning the materiality of the records to an inquiry specified in the subpoena.

POINT 1

THE PRICE ADMINISTRATOR IS NOT AUTHORIZED TO DELEGATE THE SUBPOENA POWER GRANTED HIM BY 50 U.S.C.A. APP. SEC. 922.

The case of *Porter v. Mohawk Wrecking & Lumber Co.* (CCA 6) 156 F (2) 891, forcibly sets forth why the subpoena power is not delegable in the light of *Cudahy Packing Co. v. Holland*, 315 U. S. 357, because of the pertinent language of the Emergency Price Control Act being practically identical with the provisions of the Fair Labor Standards Act construed in the *Cudahy* case.

POINT 2

EVEN THOUGH THE SUBPOENA POWER BE DELEGABLE, THE SUBPOENA DOES NOT COMPLY WITH THE PROVISIONS OF GENERAL ORDER NO. 53, AS REVISED (9 FR 5191).

General Order No. 53, as revised May 13, 1944 (9 F.R. 5191), and which is set forth in the Appendix hereto, purports to authorize regional administrators and district directors to *sign and issue* subpoenas.

Prior to this revision, General Order No. 53 (8 F.R.

9037) only allowed regional administrators and district directors to *issue* subpoenas which had been signed by the Price Administrator.

In *Pinkus v. U. S.* (CCA 7) 155 F (2) 90, p. 92, that court says:

> "Appellants also contend that the subpoenas were invalid because signed and issued by the District Director under a purported delegation of the administrator not in fact authorized by the Act. The subpoenas were issued *in the name of the administrator and signed with his name,* by the District Director, *in accordance with the provisions* of Order No. 53, as revised May 13, 1944, 9 F.R. 5191." (Italics ours.)

As we read this language it is a holding that Order 53 requires the district director to issue the subpoena in the name of the Administrator, and requires the district director to sign the Administrator's name to the subpoena.

If this is the holding, then the Circuit Court of Appeals for the Ninth Circuit has held the exact contrary, because the subpoena here (R. 6-7) was signed by the district director in his own name. In fact the name of the Administrator nowhere appears on the subpoena. The district director purports to be acting under his own individual authority, not under that of the Administrator.

POINT 3

THE SUBPOENA DOES NOT CONFINE ITS REQUIREMENTS WITHIN THE LIMITS WHICH REASON IMPOSES IN THE INSTANT CASE.

The subpoena does not state any subject of inquiry. Since no inquiry is stated the subpoena does not limit its requirements to records relevant to the non-stated inquiry. Neither does it describe the documents so they can be readily identified.

The ruling of the Circuit Court of Appeals for the Ninth Circuit holding the subpoena valid is thus in direct conflict with the following cases:

Bowles v. Beatrice Creamery Co. (CCA 10) 146 F (2) 774, 779

Fleming v. Montgomery Ward & Co. (CCA 7) 114 F (2) 384, 388, 389

Wilson v. U. S. 221 U. S. 361, 380-382

on the points mentioned. *Cf. Okla. Press Pub. Co. v. Walling,* 327 U. S. 186, 210, n. 46, 48.

POINT 4

THE SUBPOENA IS INVALID BECAUSE IT DOES NOT DEMAND PRODUCTION TO DULY CONSTITUTED AUTHORITY.

Since the subpoena failed to designate the official capacities, if any, of Owens and Patterson it does not meet the requirements of demanding submission of the records only to duly constituted authority.

Essgee Company of China v. U. S. 262 U. S. 151, 156

Fleming v. Montgomery, supra, (CCA 7) p. 388, 385

The ruling of the Circuit Court of Appeals for the Ninth Circuit in holding the subpoena valid conflicts directly with the above cases on the point.

POINT 5

THE SUBPOENA IS INVALID BECAUSE OF THE UNREASONABLE BREADTH OF ITS DEMANDS.

Since the subpoena calls for all of petitioner's records without any limitation whatsoever, and calls for all of his correspondence, it is invalid under the rules announced by *Hale v. Henkel,* 201 U. S. 43, *Fed. Trade Comm. v. Amer. Tobacco Co.* 234 U. S. 298, and *Harriman v. Interstate Commerce Commission,* 211 U. S. 407.

The ruling of the Circuit Court of Appeals for the Ninth Circuit in holding the unlimited subpoena valid directly conflicts with the above cited cases. *Cf. Okla. Press Pub. Co. v. Walling, supra,* and *Bowles v. Abendroth* (CCA 9), 151 F (2) 407, 408.

POINT 6

THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD HAVE DETERMINED WHETHER THE RULES OF CIVIL PROCEDURE APPLY.

The question is a substantial one on which there is a diversity of views among various circuits. These cases

are cited on p.p. 15-16 of the petition and we will not repeat them here.

The statute (50 U.S.C.A. App. sec. 922(e)) provides no procedure for this type of case. If the Rules of Civil Procedure apply, petitioner should have been served with a twenty day summons and the petition treated as a complaint (Rules 4, 12(a) and 3). Also findings of fact and conclusions of law would seem to be required (Rule 52(a)).

The Circuit Court of Appeals for the Ninth Circuit failed to rule on the point.

We believe the question to be one of such importance in the field of federal procedure to the courts and the bar as to warrant this court settling the point.

POINT 7

EVIDENCE OF THE MATERIALITY OF THE RECORDS SOUGHT MUST BE PRESENTED TO THE DISTRICT COURT AND THE QUESTION OF RELEVANCY DETERMINED BY THAT COURT, AND FINDINGS AND CONCLUSIONS ENTERED.

In the present case no hearing of any kind was held and no evidence of the materiality of any of the documents was presented to the district court. Neither did the court enter any findings or conclusions.

It is essential in proceedings of this character, that the court have evidence before it of the materiality of the records sought and make a determination of their relev-

ancy to the inquiry in progress and should enter findings and conclusions thereon.

Hale v. Henkel, 201 U. S. 43

Fed. Trade Comm. v. Amer. Tobacco Co., 234 U. S. 298

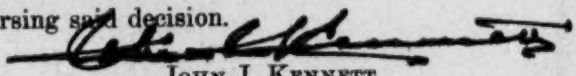
Okla. Press Pub. Co. v. Walling, 327 U. S. 186.

Rules of Civil Procedure, Rule 52(a).

The ruling of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the above authorities.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise of this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.



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APPENDIX

50 USCA App. Sec. 921 (a), (b) and (d)

(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended (Title 5, Secs. 661-673, 674). The Administrator may utilize the services of Federal, State, and Local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be

in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

50 USCA App. Secs. 922 (a), (b), (c), (e) and (g)

(a) The Administrator is authorized to make such

studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act (sections 901-946 of this Appendix), or in the administration and enforcement of this Act (sections 901-946 of this Appendix) and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a) (section 904(a) of this Appendix).

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

50 USCA App. Secs. 925 (a) and (e)

(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate

court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the

occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity as the case may be; and the word "overcharge" shall mean the amount by which the construction exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which the judgment was rendered.

GENERAL ORDER 53

OFFICE OF PRICE ADMINISTRATION

(Document No. 18060)

General Order 53

REGIONAL ADMINISTRATORS AND DISTRICT REQUIREMENTS

DELEGATION OF AUTHORITY TO ISSUE RENT AND PRICE SUBPOENAS AND INSPECTION REQUIREMENTS

Pursuant to the authority conferred upon the Administrator by the Emergency Price Control Act of 1942, as amended the following order is prescribed:

(a) *Order delegating authority to issue subpoenas and inspection requirements in rent and price investigations.* In connection with any investigation related to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective Regions, or Districts to (1) issue subpoenas, signed by the Administrator, requiring any person to appear and testify or to appear and produce documents, or both, at any designated place; (2) issue inspection requirements, signed by the Administrator, requiring any person who is engaged in the business of dealing with any commodity, or

who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 29th day of June 1943.

PRENTISS M. BROWN,
Administrator.

REVISED GENERAL ORDER NO. 53

REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS DELEGATION TO SIGN AND ISSUE RENT AND PRICE SUBPOENAS AND INSPECTION REQUIREMENTS

"General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency Price Control Act of 1942 as amended, the following order is prescribed:

(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.* In connection with any investigation releated to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation of Price Administration are each authorized within their istrators and the several District Directors of the Office of Price Administration are each authorized within their rerespective regions, or districts to sign and issue: (1) subpoenas requiring any person to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any

other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May, 1944."

CHESTER BOWLES,
Administrator.

"Issued 5-11-43, 8 FR 6199 (effective 5-11-43)."

"Issued 6-29-43 8 FR 9037 (effective 6-29-43); revised 5-13-44, 9 FR 5191 (5-13-44)."

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MAR 20 1947

No. 1036

In the Supreme Court of the United States

OCTOBER TERM, 1946

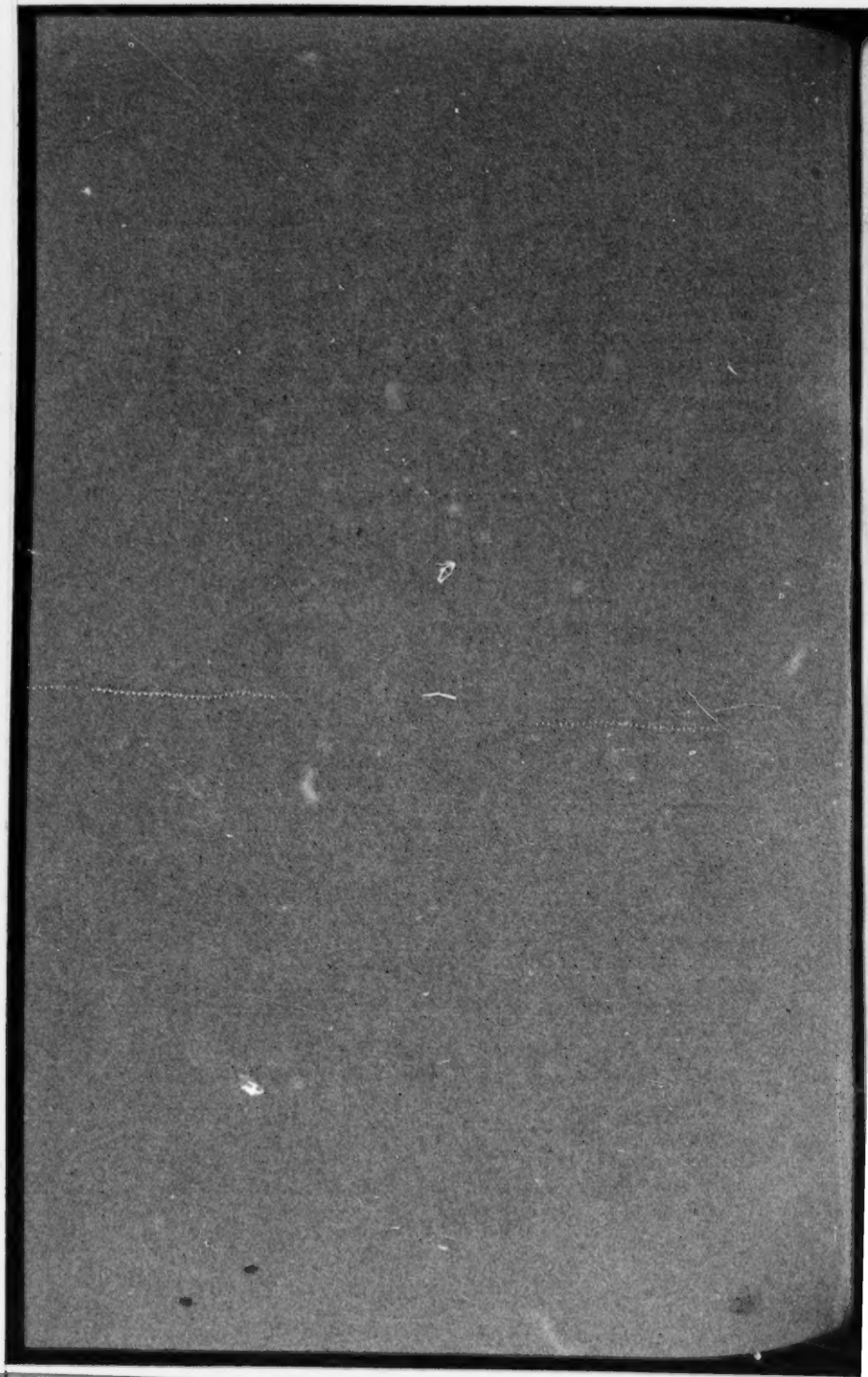
CHARLES L. SMITH, PETITIONER

v.

PHILIP B. FLEMMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 32–37) is reported at 158 F. 2d 372.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 25, 1946 (R. 37–38). A petition for rehearing was denied on December 30, 1946 (R. 38). The petition for a writ of certiorari was filed on February 17, 1947. Jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. Whether the Emergency Price Control Act of 1942 authorizes the delegation by the Price Administrator to District Directors of the authority to sign and issue subpoenas.

2. Whether Revised General Order No. 53 of the Office of Price Administration authorizes a District Director to issue such subpoenas signed by himself in his own name.

3. (a) Whether a subpoena which requires production of records before named individuals without specifying their governmental authority is valid.

(b) If not, whether an order of a district court which requires production of records before duly authorized employees of the Office of Price Administration is nevertheless improper because the original subpoena, as issued by the District Director, required production before named individuals without specifying their governmental authority.

4. Where an administrative subpoena does not in itself state the subject of inquiry or the materiality to that inquiry of the records sought but where such subject and materiality are apparent on the face of subpoena and the petition for its enforcement, whether a district court may enforce the subpoena without holding hearings as to those

issues and without entering findings of fact and conclusions of law.

5. (a) Whether a subpoena requiring all of the records of an individual is unreasonably broad, where it is clear from the face of the subpoena that it is addressed to the individual only with respect to a single business enterprise of his.

(b) If so, whether an order of a district court which expressly limited the records required to be produced to specified items, and only to such as pertained to a single business enterprise, is nevertheless improper because the original subpoena, as issued by the Price Administrator, was not expressly so limited.

6. Whether service of process of a petition for enforcement of a subpoena is essential where the opposing party has voluntarily come into court, moved to dismiss the petition, on substantive as well as procedural grounds, and submitted an affidavit in opposition to the petition.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. V, 901 et seq.) and Revised General Order 53 (9 F. R. 5191) are set forth in the Appendix, pp. 13–15.

STATEMENT

Petitioner is the sole owner of the Dungeness Company, which was engaged in the sale of canned

seafood while such products were subject to price controls.[1] On June 17, 1946, a subpoena, signed by the District Director of the Seattle District Office of the Office of Price Administration, was served on the petitioner (R. 6–8). This subpoena, addressed to "Charles L. Smith, doing business as Dungeness Company, 855 Dexter Horton Building, Seattle, Washington," ordered Smith to appear and produce for inspection and copying at his office by Ralph Owen and E. V. Patterson "all of the financial, accounting, cost and other records, including but not limited to the following:" after which followed a list of ten items, including articles of partnership, bank statements, cancelled checks, copies of income tax returns, ledgers, inventories, sales invoices, vouchers, contracts and general correspondence files (R. 6–7). The petitioner refused to produce the records (R. 4–5). On June 21, 1946, the Price Administrator filed a petition with the district court, praying for an order to require Smith to comply with the subpoena (R. 2–9). The petition set forth that the Price Administrator deemed that an investigation was necessary to assist in the administration and enforcement of the Act and regulations, and to

[1] Canned seafood was covered by a number of maximum price regulations, each of which contained record-keeping requirements. See, e. g., MPR 209 (7 F. R. 6788) (Sardines); MPR 265 (7 F. R. 9229) (Canned salmon); MPR 311 (8 F. R. 1269) (Canned shrimp); MPR 448 (8 F. R. 11435) (Canned clams); MPR 537 (9 F. R. 5924) (Canned fish flakes); MPR 587 (10 F. R. 5905) (Miscellaneous canned fish and seafood).

ascertain whether the Dungeness Company had complied therewith, and that in conducting this investigation, it was deemed necessary to obtain information from that company's records (R. 4). The petitioner voluntarily came into the district court on June 24, 1946, and made three motions to dismiss the petition: (1) Appearing specially, he asserted that the petition was insufficient on its face and invalid; (2) Also appearing specially, he asserted that he had not been served with process; (3) Without waiving the prior motions, he asserted that the court lacked jurisdiction of the subject matter and that the petition failed to state a claim upon which relief could be granted (R. 9–11). On the same day, he also submitted an affidavit, asserting that he was the sole owner of the Dungeness Company; that he had sole custody of its records; that he had been handed a subpoena which did not purport to be signed by or on behalf of Paul A. Porter, the then Price Administrator; that his refusal to honor this purported supoena was not contumacious but because he believed it to be invalid; and that to require production of his books and records would be to violate his constitutional right against self-incrimination (R. 12–13).

On August 5 and 7, 1946, the district court entered orders requiring the petitioner to produce records, and denying the petitioner's three motions (R. 15–19). The order requiring production of the documents differed from the subpoena in three

principal respects: (1) The records were to be made available to Paul A. Porter and his duly authorized employees; (2) the documents required were specifically delimited to those pertaining to the business of the Dungeness Company; and (3) the clause requiring production of "all of the financial, accounting, cost and other records, including but not limited to the following:" was eliminated and only the records specifically enumerated in the subpoena were required (R. 15–16). On November 25, 1946, these orders were affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 32–38), and on December 23, 1946, a petition for rehearing was denied (R. 38).

ARGUMENT

1. There are now pending before this Court *Raley* v. *Fleming* and *Fleming* v. *Mohawk Wrecking & Lumber Co.,* Nos. 512 and 583, in which the power of the Price Administrator to delegate to District Directors the authority to sign and issue subpoenas is at issue. The Court may prefer to defer action on this petition pending disposition of those cases.

2. The delegation of authority set forth in Revised General Order No. 53 (Appendix, pp. 14–15), is not limited to the issuance by the delegate of a subpoena signed by him in the Price Administrator's name, as distinguished from one signed by the delegate in his own name, as was done here. The Order does not specify that one or the other

form must be used. In the *Raley* and *Mohawk* cases, *supra,* the subpoenas were signed in the District Director's name, and it was assumed that the requirements of the regulation had been met.

3. The subpoena was not rendered invalid by its requirement that records be produced before named individuals without specifying their governmental authority. The petitioner did not question in the district court the status of the individuals named, and the district court could probably have taken judicial notice of the identity of government employees had the issue been raised. Cf. *New York & Maryland Line R. R. Co.* v. *Winans,* 17 How. 30. Moreover, as pointed out by the court below, if the petitioner had any doubts, he "could readily have asked for their credentials" (R. 36). In any event, the order of the district court required that the petitioner make the records available "to Paul A. Porter, Administrator of the Office of Price Administration, and his duly authorized employees," and the issue before the circuit court of apeals was not the propriety of the subpoena as originally drafted, but the validity of the order of the district court from which the appeal had been taken. See *Cudmore* v. *Bowles,* 145 F. 2d 697 (App. D. C.), certiorari denied, 324 U. S. 841; *Hagen* v. *Porter,* 156 F. 2d 362 (C. C. A. 9th), certiorari denied, No. 331, October Term, 1946.

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4. The purpose of the inquiry and the materiality thereto of the records sought were sufficiently shown on the face of the petition for enforcement of the subpoena to warrant the district court in ordering production of the records. In the petition for enforcement of the subpoena, it was expressly stated that an investigation was deemed necessary to assist in the administration and enforcement of the Act and regulations and to ascertain whether the Dungeness Company had complied therewith (R. 4). It was likewise alleged and not denied that the documents sought to be produced were relevant and material to the investigation (R. 5); and no attack on the materiality of any particular document has been made by the petitioner at any stage of these proceedings. No further showing of materiality by the Administrator was necessary. *Brown* v. *United States,* 276 U. S. 134, 143; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186.

Nor is there any merit to petitioner's contention that the district court should have held hearings and issued findings of fact and conclusions of law, such as those required by Rule 52 (a) of the Federal Rules of Civil Procedure. Such steps need not be taken in the relatively summary proceedings involved in the enforcement of an administrative subpoena. Petitioner cites no case in conflict with the rule in *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F. 2d 450 (C. C. A. 6th), that these requirements are in-

applicable to the enforcement of administrative subpoenas.[2]

5. The subpoena, either as issued by the Administrator or as enforced by the court, was not unreasonably broad in its demands. The subpoena was limited to records of the petitioner pertaining to his Dungeness Company business, since it was addressed to him not in his personal capacity, but to "Charles L. Smith, doing business as Dungeness Company" (R. 6). The subpoena called for "all of the financial, accounting, cost and other records * * * ." "Other records" would be subject to the normal interpretation pursuant to the rule of *eiusdem generis,* and would mean merely other records of the same general type, i. e., prices paid and received, expenditures and income, and the like. And since the records were to be produced for inspection and copying at the petitioner's offices, there can be no contention, such as there was in *Hale* v. *Henkel,* 201 U. S. 43, upon which the petitioner relies, that removal of his records would bring

[2] Nor does conflict exist, in the cases cited by petitioner, as to applicability of any other particular part of the Rules; though some courts have applied some of the Rules and other courts have refused to apply others. As observed in *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, 226–7 (C. C. A. 2), affirmed, 317 U. S. 501, the Rules could properly be followed for appellate procedure, yet be inapplicable to pre-appellate procedure.

It is further to be noted that since the applicability henceforth of the Federal Rules to proceedings of this nature has been clarified by the amended Rule 81 (a) (3), there is no need to decide their applicability in the instant case.

petitioner's business to a standstill. Cf. *Raley* v. *Porter,* 156 F. 2d 561 (App. D. C.), certiorari granted, No. 512, October Term, 1946. (Certiorari was denied as to this issue, being limited to the delegation question.)

In any event, the order of the district court specifically limited the records required to those pertaining to the business of the Dungeness Company, and eliminated the clause ordering "all of the financial, accounting, cost and other records * * *," confining itself to ten enumerated classes of documents (R. 15–16). No objection was addressed by the petitioner to any of the classes of records listed, on the ground of vagueness or breadth. And, in fact, subpoenas at least as broad have been sustained by this Court. Cf. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186; *Brown* v. *United States,* 276 U. S. 134; *Wheeler* v. *United States,* 226 U. S. 478. Thus, even if the subpoenas, as drawn by the Administrator, were invalidly broad or uncertain, the district court properly, in the exercise of its discretion, modified them to render them valid, and then enforced them as modified. There is no reason why the district court should have been compelled to accept or reject them in their entirety (*Hagen* v. *Porter,* 156 F. 2d 362 (C. C. A. 9th), certiorari denied No. 331, October Term, 1946) any more than a court enforcing an order

of an administrative body is denied discretion, where it finds the order partially illegal, to enforce it insofar as it is valid. Cf., e. g., *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332.

6. The voluntary appearance of the petitioner in court and his contest of the propriety of the subpoena on the merits, cured any defect in the lack of service and obviated the necessity of subsequent service. Petitioner appeared in court to move to dismiss the petition for enforcement for various reasons (including a substantive attack on the petition on the grounds that the court lacked jurisdiction over the subject matter and that the petition failed to state a claim upon which relief could be granted), and likewise filed an affidavit in support of his position (R. 9–13). As pointed out by the court below, "process would presumably have been issued and served in due course had not appellant's voluntary appearance rendered that procedure unnecessary." (R. 35). Cf. *Shotkin* v. *Nelson,* 146 F. 2d 402, 405 (C. C. A. 10th); *United States* v. *Cream Products Distributing Co.,* 156 F. 2d 732, 734 (C. C. A. 7th).

CONCLUSION

Since this case involves a question as to the authority of the Price Administration to delegate his subpoena powers, the Court may desire to postpone action on the petition pending disposition of the *Raley* and *Mohawk* cases, Nos. 512 and

583, now awaiting argument and decision on the merits. In all other respects, certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,
DAVID LONDON,
Director, Litigation Division,
SAMUEL MERMIN,
Solicitor, Litigation Division,
ALBERT J. ROSENTHAL,
Attorney,
Office of Price Administration,
Office of Temporary Controls.

MARCH 1947.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Secs. 901 et seq.).

SEC. 202 (a). The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any

other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order rquiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

2. Provisions of Revised General Order 53 (9 F. R. 5191, May 13, 1944):

General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency Price Control Act of 1942 as amended, the following order is prescribed:

(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.*—In connection with any investigation related to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective regions, or districts to sign and issue: (1) subpoenas requiring any person to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1947